85-942

Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ALBERT JOHN FERN, JR. PETITIONER

v.

JOAN E. FERN, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA STATE COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION ONE

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QUESTIONS PRESENTED

(1) Whether a divorce court decree which became final prior to the date the FSPA, 10 U.S.C. § 1408, entered into force on February 1, 1983, and which divided Army retired pay pursuant to state law, can be collaterally attacked as having been rendered without jurisdiction on grounds that federal law as then in force had preempted state law and therefore barred such a result.

(2) Whether by means of the retroactive application of FSPA the Congress may constitutionally deprive an Army officer of a substantial portion of his retired pay after he has served 28 years of active duty service and become entitled to such retired pay.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District.

Petitioner, ALBERT JOHN FERN, JR., a retired military officer, respectfully prays that a Writ of Certiorari issue to review the judgment of the California Court of Appeal entered on May 17, 1985 which affirmed an Order and Judgment of the Superior Court, Monterey County.

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OPINION BELOW

The opinion of the California Court of Appeal is not reported. It is set forth in Appendix A, infra. The Order of the California Supreme Court denying petitioner's petition for hearing is not reported and is reproduced in Appendix B.

JURISDICTION OF THIS COURT TO ENTERTAIN THE PETITION

The California Court of Appeal entered its judgment on May 17, 1985. The Supreme Court of California denied petitioner's timely-filed Petition for Hearing on July 31, 1985. A timely request for an extension of time within which to file an application for a Writ of Certiorari was filed, and this Court entered an Order dated October 21, 1985, extending the time within which the application may be filed to and including November 28, 1985. A copy of that Order is set forth in Appendix C. By operation of 28 U.S.C. § 2101(c), the time within which the application may be filed is extended to November 29, 1985 (because November 28, 1985 is a legal holiday). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Petitioner argued below that the

Former Spouses Protection Act, 28 U.S.C. § 1408 ("FSPA"), as applied, operated with retroactive effect to deprive him of 45% of Army retired pay which he had earned, and as such was repugnant to the Fifth Amendment of the Constitution. The California courts upheld the statute's validity.

This case involves the following statutes:

10 U.S.C. §§ 688(a); 1408(c)(1), (c)(3) and (e)(1); 3911; and 3929

28 U.S.C. 1331(a), 1332(a), 1342a

California Civil Code § 5100

Except as set forth in the text, these statutes, along with Amendment V, of the United States Constitution, appear in Appendix D.

STATEMENT OF THE CASE

Petitioner is a retired Army Officer domiciled in California. He remains in the military subject to recall to active duty at any time by the Secretary of the Army. His marriage to respondent ended in a judgment of dissolution dated August 15, 1978 issued by the Superior Court of California, County of Monterey. As of the date of his divorce petitioner had served 28 years in the Army. On the occasion of his divorce, petitioner indicated an intention to remain in the Army until he could achieve 30 years of active duty, so as to enlarge his retired pay when payable. The divorce court however directed him in the judgment to pay respondent an amount equal to 45% of the retired pay that petitioner would

receive if he then retired. Petitioner made such payments out of his active-duty pay for one year after the divorce decree. Unable to make ends meet on the residual sum from active duty pay left over after paying retired pay to the ex-spouse, in 1979 petitioner retired from the Army and began receiving retired pay. He continued paying respondent until the decision of this Court issued in McCarty v. McCarty, 453 U.S. 210, on June 26, 1981.

This Court held in McCarty that "the application of community property law conflicts with the federal military retirement scheme" (453 U.S. at 223); Congress intended that retired pay reach the officer as his personal entitlement" (Id., at 224, 226-227); "Congress intended that military retired pay 'actually reach the beneficiary'" (Id.

at 228); and community property division of retired pay threatens grave harm to 'clear and substantial' to federal interests." (Id. 232).

Petitioner viewed McCarty as fully applicable to him. Respondent, however, on April 16, 1983 brought an enforcement action to compel petitioner to resume payments of retired pay to her. Petitioner first removed the enforcement complaint to Federal Court; [1] He subsequently filed an original action in Federal District Court for the Northern District of California attacking that

[1] Petitioner removed under § 1446(b) and § 1442a to the Norhtern District of California, intending with respect to § 1442a to assert defenses based upon federal preemption principles. By unpublished order dated September 15, 1982, the District Court (J. Ingram) rejected the federal question and diversity jurisdiction based upon marital exception to federal jurisdiction. The District Court did not address § 1442a removal expressly in its order remanding the case to the Superior Court.

portion of his 1978 judgment which divided his military pay. [2]

After remand, the Superior Court rejected petitioner's claims that by virtue of the same authorities as those successfully urged by the military officer in McCarty, petitioner was entitled to secure a modification of his 1978 judgment to provide that the entirety of his military retired pay belonged to him alone. Following a hearing an order issued determining retirement benefit arrearages in the amount of $37,620.00. At the time of

[2] Petitioner's complaint asserted both federal question and diversity jurisdiction as against both the ex-spouse and the Secretary of the Army. By order dated September 21, 1982, the District Court (J. Schumanger) in an unreported opinion dismissed the complaint lack of diversity jurisdiction based upon the marital exception to federal jurisdiction. The Ninth Circuit affirmed in a published decision 736 F.2d 1367 (1985), and this Court denied certiorari, 105 S.Ct. 1177 (1985).

the Superior Court decree the the FSPA had been enacted but had not yet entered into force. That legislation in its central provision prescribes that effective June 25, 1981, i.e., one day prior to this Court's decision in McCarty -- as a matter of federal law, state law shall apply with respect to the disposition of military retired pay. 3/ On appeal, petitioner renewed

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3/ Section (c) (1) of the FSPA states as follows:

> . . . a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

The Act further provides for direct payment by the military to an ex-spouse holding a "final decree" dividing military retired pay. The Act set out limitations against over-reaching by the state courts: e.g., the parties shall have been married at least 10 years. Section (d)(2); the military officer shall not be compelled by state law to retire from active duty. Section (c)(3); no more than 50% of "disposable" retired pay may be divided. Section (e)(1).

his federal preemption arguments both in his briefs and in oral argument urging that the 1978 divorce court had lacked jurisdiction to divide his retired pay. He contended that to the extent federal law, as set forth in McCarty, had determined that military retired pay belonged to the officer alone, that entitlement had fully matured under federal law and could not be taken away from him unless he resigned from the miliary or was otherwise disciplined under the Code of Military Justice. To the extent that the Congress and the FSPA had employed a legal device to allow California to treat military retired pay as "property" subject to division upon divorce and had done so with retroactive effect, the Congress had deprived him of property without due

process or just compensation in violation of the Fifth Amendment.

The Court of Appeal rejected petitioner's arguments, holding on the basis of a growing number of California authorities that McCarty had no retroactive application. It noted that the Constitutionality of the FSPA had been upheld by several California courts. [4/] The California Supreme Court refused to hear the case, and this petition followed.

[4/] Petitioner also urged before the Court of Appeal that the ex-spouse had waived her rights to military retired pay by virtue of an agreement with petitioner. The court rejected the waiver argument, and that issue is not further pursued in this Petition.

ARGUMENT

1. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

The decision below conflicts with two decisions of this Court decided in the same year as McCarty: (1) Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981), which determined that a court concerned with federal law "lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." 449 U.S. at 379; and (2) Ridgway v. Ridgway, 454 U.S. 46 (1981), which determined that "a state divorce decree . . . must give way to clearly conflicting federal enactments." 454 U.S. at 55.

Firestone establishes that an analysis concerning the purported intention of this Court to have McCarty operate only

prospectively cannot possibly be correct. Ridgway shows that in a concrete setting in which a final state court divorce de[illegible] was attacked on federal preemption grounds, principles of res judicata were not sufficient to frustrate the result dictated by the Supremacy Clause of the Constitution. 5/

Shortly after McCarty came down, the California Court of Appeal in In re Marriage of Sheldon, 124 Cal.App.3d 371 (1981) appeal dism'd., 456 U.S. 941 (1982), declared that McCarty had no

5/ In Ridgway, a serviceman had stipulated in a property settlement agreement incorporated into a Maine divorce decree that he would maintain his ex-spouse as beneficiary on his military life insurance policy. The serviceman remarried and changed the designation of beneficiary so as to insure that the proceeds were routed to his widow. In a litigation between the ex-spouse and the widow, the Maine Supreme Court held for the ex-spouse; but this court held for the widow, based upon the overriding requirements of federal law. Not even the stipulated agreement of the serviceman could defeat his rights, safeguarded to him under federal law to name the beneficiary.

retroactive application. In reaching this conclusion, the Court of Appeal did not use the the very recent authority in Firestone, it preferred to see McCarty in non-jurisdictional terms and instead embraced the three-part test outlined in Chevron Oil Co. v. Huson, 404 U.S. 91 (1971), decided 10 years before McCarty and Firestone. 6/ Chevron considers when a rule of substantive law or conduct announced by a court should receive retroactive application. By contrast, where jurisdiction is involved, Chevron is inapplicable, and the rule in Firestone must govern. Holzsager v. Valley Hospital, 646 F.2d 792, 798 (CA2 1981) (concurring opinion).

6/ Having determined to apply the criteria in Chevron, the Sheldon court proceeded to rely on state — rather than federal — precedents to support its conclusion that each of the prongs in the Chevron test supported a conclusion of non-retroactivity of McCarty.

It has long been understood that exceptions to the rule of res judicata are necessary in order to prevent controlling federal law and related policies from being frustrated by state court decisions which implement conflicting state law. 7/ Even where a state court considered its

7/ The modern formulation of the res judicata rule — that a matter raised in defense is barred if it was raised or could have been raised between the same parties in a prior litigation (Federated Department Stores v. Moitie 452 U.S. 394 (1981) — was first stated in Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940). But in that same year, the Court recognized an exception for federal preemption cases. Kalb v. Feuerstein, 308 U.S. 433 (1940) (final state court judgment cannot be interposed as against collateral attack based on federal bankruptcy law); and United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940) (prior judgment cannot successfully be urged as a bar in a subsequent litigation to a sovereign immunity defense; there are "areas, including competing policies to that of repose to justify collateral attack); Cf., United States v. Hellard, 322 U.S. 363 (1943) (prior state court judgment cannot be used to interfere with overriding federal policy to safeguard Indian-owned land); United States v. Pink, 315 U.S. 203 (1942) (prior state court judgment not entitled to preclusive effect if it conflicts with exercise by President of foreign relations powers).

jurisdiction and upheld it, rejecting federal preemption as an objection, its judgment cannot thereby be insulated against subsequent collateral attack. See, Durfee v. Duke, 374 U.S. 106, 114 (1963) (as against a res judicata defense that jurisdiction was determined in the prior litigation, "[d]octrines of federal preemption or sovereign immunity may in some contexts be controlling").

Lower federal courts have invalidated state court judgments, where the collateral attack was brought upon federal preemption principles. 8/ The preempted

8/ See United States v. City of New Haven, 496 F.2d 452 (CA2 1974) appeal dismissed, cert. den., 419 U.S. 958 (1975) (state court judgment applying state law to regulate air space invalidated by pervasive federal law); Hoffman v. United States, 391 F.2d 972 (CA9 1968) (divorce court judgment invalidated in collateral attack on grounds of preempting federal law); Eldin v. United States, 157 F.Supp. 34 (S.D.Ill. 1957) (same); Kaske v. Rothert, 133 F.Supp. 427 (S.D.Cal. 1955) (same); Heifner v. Sonderstrom, 134 F.Supp. 174 (N.D. Iowa 1955) (same).

state law has been characterized by this Court as "void" and a "nullity." Kalb v. Feuerstein, 308 U.S. 433, 438-39 (1940). 9/

The 1981 iron triangle of authority which correctly guides the state courts in dealing fairly with the petitions of divorced retired military officers to secure their retired pay consists of McCarty, Firestone and Ridgeway. This Court should be vigilant to ensure that the Supremacy Clause is not undermined by the application of inappropriate doctrines. In the exercise of its authority

9/ See, United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512 (state judgment is "void"); Lockheed Air Terminal, Inc. v. City of Burbank, 457 F.2d 667, 676 (CA9 1972) (application of the preempted state law is "unconstitutional, illegal and void."). Cf., Carpenters' Pension Trust, etc. v. Kronschabel, 460 F.Supp. 978, 980 (C.D.Cal. 1978, aff'd. 632 F.2d 45 (CA9 1980) cert. denied, 453 U.S. 922 (1981) ("local laws which impinge on an exclusive federal domain are not enforceable").

to insure that state courts give effect to controlling federal law principles the Court should issue its writ.

II. SERIOUS CONSTITUTIONAL QUESTIONS ARE PRESENTED.

When petitioner completed 20 years of credible military services and retired from active duty before the enactment of the FSPA, he became entitled, as a matter of federal law, to receive the entirety of his military retired pay. 10 U.S.C. §§ 3911, 3929.

Petitioner does not dispute "that Congress may prospectively reduce the pay of members of the Armed Forces, . . . It is quite a different matter, however, for Congress to deprive a service member of his due for services already performed, but still owing. In that case, the Congressional action would appear in a different constitutional light." United

States v. Larionoff, 431 U.S. 864, 879 (1977). See also, Costello v. United States, 587 F.2d 424, 427 (CA9 1978) cert. denied, 442 U.S. 929 (1979) (Court would "proceed on the assumption, arguendo, that if [military] retirement pay had been fully earned at the date of retirement it could not be divested without compensation").

A serious Constitutional question is presented whether Congress may first induce a soldier to serve 28 years in the Army with a promise that his retired pay will be his "personal entitlement" and later, in the FSPA, change the rules so as to divert a substantial part of his pay to another with retroactive effect.

The taking of property from one and transferring it to another without compensation is an uncompensated taking. United States v. Security Industrial Bank, 459

U.S. 70 (1982) (governmental action that would retroactively result in benefiting debtors in bankruptcy by impairing property interests of creditors holding secured liens would constitute a Fifth Amendment taking); Railroad Retirement Board v. Alton Co., 295 U.S. 330 (1935) (Congressional Act providing a compulsory pension plan for railroad employees constitutes a taking of assets without just compensation.)

It is not necessary that the government acquire for itself the property in question; governmental action in shifting a portion of an officer's retired pay to an ex-spouse is as much an impermissible taking as if the funds had first gone to the U.S. Treasury and had then been immediately routed by it to the ex-spouse. United States v. Security Industrial Bank, 459 U.S. 70, 77-78 (1982)

("While the classical taking is of the sort that the government describes, [government acquired property for itself], our cases show that takings analysis is not necessarily limited to outright acquisitions by the government for itself.") Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 602 (1935) ("The province of the Court is limited to deciding whether the [Act] as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value. [citations omitted.] As we conclude that the act as applied has done so, we must hold it void").

The California Court of Appeals has repeatedly upheld "the FSPA and its retroactive application". (Appendix A1, pp. 1-8 and cases cited therein.) It may be that the Act can be interpreted so as

not to foreclose a collateral attack on a 1978 divorce decree. [10] But if the Act does operate to defeat the interest of the class of divorced retired military officers its rational purpose is not easily identified. The Act does not establish a federal community property scheme; it only lets the states pursue their community property policies as they wish. The legislation cannot be based upon the perceived need of ex-spouses, since community property divisions under

[10] Since the Act applies only to pay periods beginning on June 25, 1981 and does not apply to a judgment in a "final decree" prior to that date, petitioner's 1978 judgment lies outside the scope of the Act. Petitioner's federal preemption claims exist independently of McCarty; that decision only recognized the law that had always existed. Courts will of course always strive to avoid the retroactivity issue if by statutory construction that can be done. See United States v. Security National Bank, supra.

state law are not based on need. 11/ And the Act produces random results: servicemen in neighboring states may be treated differently with respect to the division of their retired pay.

If ex-spouses of certain military officers are retroactively to become entitled to pension benefits from the Army, the Congress should hold the public responsible for the direct payment of these benefits; the Congress must not take away retired pay from those who have earned it and give it to a new, favored group. . "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation

11/ See California Civil Code § 5110. Here, for example, there is no "need" and the ex-spouse has long ago remarried. Cf. Louisville Joint Stock Land Bank v. Radford, supra, 295 US 555, 602 (1935). ("however great the nation's need, private property shall not be thus taken even for a wholly public use without just compensation.")

was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). See also, Dames & Moore v. Regan, 453 U.S. 654, 690 (1981) (concurring opinion); Thibodo v. United States, 187 F.2d 249 (CA9 1951).

This Court should grant the writ to safeguard the interests of numerous military officers who have earned their federal entitlement to retired pay. The Court should declare that it is too late in the Constitutional day for pension rights retroactively to be readjusted in the arbitrary manner in which the Congress has done in the FSPA.

III. THE ISSUE IS IMPORTANT.

(A) The Federal Courts Have Been Closed

The retired military member divorced in one of the eight community property states, increasingly sees himself as abandoned by the federal government in his decade-old [12] struggle to preserve his retired pay. After recognition of his rights to the entirety of his retired pay in McCarty, [13] he noted with disillusion

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12/ In re Marriage of Fithian, 10 Cal.3d 592, 111 Cal.Rptr. 369 (1974), cert. denied, 419 U.S. 829 (1974), established in California that no federal preemption of California's community property regime was to be found. In Texas, three appellate decisions held that retired pay was a mere expectancy and hence not divisible as a community property asset upon divorce. Bright v. Bright, 531 S.W.2d 440 (Tex. Civ.App. 1975); Lumkins v. Lumkins 519 S.W.2d 491 (Tex.Civ.App. 1975); Davis v. Davis 495 S.W.2d 607 (Tex.Civ.App. 1973). Only in 1976 did the Texas Supreme Court disapprove these decisions and hold retired pay divisible in Cearley v. Cearley, 544 S.W.2d 661.

13/ The McCarty court accepted arguments concerning federal law which conflicted with California's community property scheme which the Fithian court, supra, had considered and rejected in 1974. But McCarty had earlier been fore-

that the Executive Branch did little [14] to stop the rush by the Congress to overturn McCarty. [15] Since enactment of the FSPA, the federal courts have closed their doors to him: they have refused original jurisdiction under § 1331 [16] and

shadowed by Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S.Ct. 802 (1979) which had held that unlike state law community property concepts in which an ex-spouse claims as an owner, under federal law, the ex-spouse must be regarded as putting forward a claim to retirement benefits as a creditor. Hisquierdo, supra, at 811.

[14] See, S.Rep. No. 97-502, 97th Cong., 2nd Sess. (1982), reprinted in Congressional and Administrative News 1982, Vol. 3, pgs. 1601-1603. (Defense Department has no objection to the legislation.)

[15] The FSPA was enacted in September 1982, only 14 months after McCarty. There were no hearings on the legislation, and it was passed as a rider to other legislation. The Congress transformed McCarty into an ideological battleground over women's issues. See, S.Rep. No. 97-502, 97th Cong., 2nd Sess. (1982), reprinted in Congressional and Administrative News 1982, Vol. 3, pgs. 1596-1640.

[16] Armstrong v. Armstrong, 696 F.2d 1237 (CA9), cert. denied, 104 S.Ct. 337 (1983) (federal issues "have validity only as defenses to the state judgment"); Fern v. Turman, 736 F.2d 1367 (CA9 1984), cert. denied, 105 S.Ct. 1177 (1985) (same); Whittington v. Whittington, 733

§ 1332(a); [17] and by way of removal under the military personnel removal statute, 28 U.S.C. § 1442a. [18] The unkindest cut is to be found in the newly emerging insistence by the Ninth Circuit Court that the Supreme Court did after all decide the

F.2d 620 (1984) (same).

[17] Fern v. Turman, supra (marital exception applied to defeat diversity jurisdiction).

[18] Petitioner in this case attempted removal, without success, under § 1441(b) as well as § 1442a. Although the latter provision was enacted in the interest of national supremacy (which requires the protection of the military officer in actions brought against him which attack and threaten him with personal liability, Willingham v. Morgan 395 U.S. 402, 406-407 (1969)), the federal preemption defenses of the retired military officer have been shut out by the federal courts under this removal statute. See Matter of Marriage of Smith, 549 F.Supp. 761 (W.D. Tex. 1982) (statute will be given a restricted reading; although the retired officer is in the military, his defense of entitlement does not arise "under color of his office or status.")

Normally, the federal officer removal statute is not "narrow" or "limited". Colorado v. Symes, 286 U.S. 5510, 517 (1932), and the officer need not win his case before he can have it removed. Only in military retired pay cases have the policy interests underlying § 1442a been frustrated by a narrow, grudging interpretation of this section.

McCarty retroactivity issue when it dismissed the appeal in Re Marriage of Sheldon. 124 Cal.App.3d 371, 177 Cal.Rptr. 383 (1981), dismissed, 456 U.S. 941 (1982). 19/

His abandonment by the federal courts has left the retired member to the mercies of the state courts in the community property states. The California Court of Appeal has avoided a federal preemption analysis; it has turned back every collateral attack brought by a retired

19/ In White v. White, 731 F.2d 1440 (1980), the Court took jurisdiction under § 1983, only to declare that the dismissal by this Court of an appeal petition in Sheldon totally disposed of all federal preemption issues associated with McCarty.

Neither the broad class of servicemen intensely interested in the question nor the specialized bar will be persuaded by the idea that this Court intended to resolve on the merits and in such a manner the important issues presented.

military officer based upon McCarty. 20/

Since the FSPA entered into force, the California courts have rejoiced that McCarty had been "obliterated"; 21/ state courts have also set out to dismantle the few limitations in the Act provided by the

20/ In Texas, a court of appeal in Ex Parte Buckhanan, 626 S.W.2d 65 (Tex.App. 1981) followed a federal preemption analysis such as that set forth by petitioner herein. It allowed a retired military officer collaterally to attack a pre-McCarty divorce decree dividing military retired pay. The court noted that federal preemption represented one of a limited number of 'extrinsic factors" of such importance as to constitute exceptions to doctrines of repose embraced by res judicata. Shortly thereafter, however, another Texas court of appeal in Ex Parte Hovermale, 636 S.W.2d 828 (Tex.App. 1982), disagreed. It opined that there were two kinds of federal preemptions — real federal preemptions and "non-preempting federal preemptions". McCarty, it concluded, was the second kind. Id., at 831.

21/ In Re Marriage of Van Dyke, ___ Cal.App. ___, 218 Cal.Rptr. 11 (1985).

Congress as thin protective reeds for the retired military member. 22/

Because the federal courts will not hear the federal preemption and unconstitutionality claims of the retired military officer, there are no conflicts between the circuits for petitioner to present to this Court. Unable to secure the serious concern of the federal courts, the mili-

22/ E.g.: Section (C)(3) of the Act states that "no court may order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section." But despite this prohibition, California directs that a military member wishing to remain on active duty must nevertheless pay his ex-spouse an allocable share of his retired pay out of his current active duty pay. In re Marriage of Scott, 156 Cal.App.3d 251, 202 Cal.Rptr. 716 (1984). Despite the limitation in the Act in § (d)(2) that parties must have been married for a minimum of 10 years, military retired pay is being divided even where the marriage was of shorter duration. Matter of Marriage of Wood, 676 P.2d 388 (Or.App. 1984) ("USFSPA allows courts to treat military pensions as marital property . . . regardless of the duration of the marriage which is dissolved.") Despite the limitation in the Act, § (e)(1) that the allowable share of the ex-spouse may not exceed 50% of "disposable retired pay, the ex-spouse is being awarded 50% of gross pay.

tary officer pleads that very ground as an urgent necessity for this Court to grant him his federal hearing as to his federal preemption and constitutional grounds. It is simply not within the Constitutional scheme that a broad class of aggrieved military officers should be systematically shunted to the state courts to argue why on compelling federal law and Constitutional grounds state court judgments may not be enforced against them.

(B) Rewriting History.

For over 100 years the retired officer was understood as remaining in the military despite his retired status. McCarty, supra, at 221. United States v. Tyler, 105 U.S. 244 (1882). He remains subject to recall to active service "at any time" by order of the Secretary of his service. 10 U.S.C. § 688(a). He is subject to other limitations. 23/ These

special burdens justified the understanding that the retired officer was performing current, reduced services for current reduced pay. McCarty, supra, at 222. It is just this aspect of his retired pay that served to disable him from putting forward due process claims when his retired pay was prospectively altered. See Puglisi v. United States, 564 F.2d 403 (Ct.Cl. 1977) cert. denied, 435 U.S. 968.

In the FSPA, however, Congress must be deemed necessarily to have discarded the idea of retired pay as pay for current services; instead it has accommodated the community property perspective which considers retired pay to be deferred compensation for prior work, In re

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23/ E.g., he remains subject to the discipline of the Code of Military Justice. 10 U.S.C. § 802(4). See McCarty, supra, at 222. There are numerous limitations.

Marriage of Fithian, 10 Cal.3d 592, 603, 111 Cal.Rptr. 369 (1974) cert. denied, 419 U.S. 825 (1974), and hence property subject to division upon divorce.

The Congress should not rewrite the service history of the retired servicemen and use fashionable current ideology to right imagined wrongs of prior generations. It is to him that the earlier Congresses had made promises -- and not to his ex-spouse -- so that he would be induced to remain in the military. It is he and not his ex-spouse who served in combat -- who may have been wounded, captured, tortured; and it is he and not the ex-spouse who will be recalled to active duty when the emergency arises.

It is unwise public policy to allow the numerous divorced military officers to become, in their retirement, an embittered underclass, seeing themselves abandoned as

to their retirement interests by the federal government. Perhaps their reliance upon federal preemption and constitutional principles is mistaken; but if so, and in light of the importance of the question it is this Court which should so state after granting petitioner plenary review.

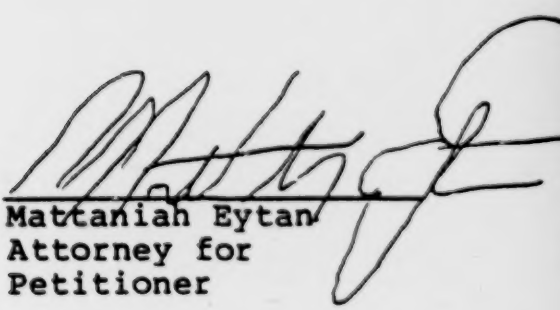
IV. CONCLUSION.

For reasons set forth herein, the Court is requested to grant the petition and to issue a Writ of Certiorari to the California Court of Appeal, Division One, for each of the questions presented.

Dated: November 27, 1985.

Respectfully submitted,

KAPLAN, RUSSIN, VECCHI,
EYTAN & COLLINS

By 
Mattaniah Eytan
Attorney for
Petitioner

APPENDIX A

IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

May 17, 1985

In re the Marriage of
JOAN and ALBERT JOHN
FERN, JR.

JOAN E. FERN,

Respondent,

v.

ALBERT JOHN FERN, JR.,

Appellant.

AO 21180
(Monterey
County
Super.
Ct. No.
DR 8643)

This case concerns the community property division of husband's military retirement benefits under a 1978 dissolution decree. Relying principally on McCarty v. McCarty (1981) 453 U.S. 210, appellant husband now challenges the

validity of that final award. We affirm.

FACTS

The facts, essentially uncontroverted, are stated briefly:

The interlocutory decree entered June 13, 1978, ordered, inter alia, that husband pay to wife 45 percent of his military retirement benefits, plus any cost-of-living increases. No appeal was taken from either the interlocutory or final decree which have since become final.

After initial monthly partial payments, husband ceased payments in 1981; in April 1982 wife filed a motion to determine arrearages and to modify the child support order.

Following husband's unsuccessful removal action to the federal court, [1] a hearing on wife's motion resulted in an

order increasing child support to $200 per month, determining retirement benefit arrearages in the amount of $37,620.00, ordering husband to authorize direct payment of retirement benefits and awarding wife attorney fees of $1,990.69.

Upon denial of his motion for reconsideration, husband has taken this appeal.

CONTENTIONS

Husband raises three challenges to the retirement benefits award: 1) the interlocutory decree of dissolution was void in its award of his military retirement benefits to wife; 2) the federal Uniformed Services Former Spouses

[1] Husband also filed suit in federal district court, but the action was dismissed for lack of subject matter jurisdiction. The Ninth Circuit upheld the dismissal in Fern v. Turman (1984) 736 F.2d 1367, cert. den. (1985) ___ U.S. ___ [105 S.Ct. 1177].

Protection Act (hereafter FSPA) [2] is an unconstitutional taking of vested rights in military retirement benefits; and 3) in any event, wife waived her right to receive any payment for arrearages before 1981. For the reasons which follow, we find the challenges meritless.

DISCUSSION

As earlier noted, the 1978 interlocutory decree which awarded wife a 45 percent community property interest in husband's military retirement benefits was properly authorized when ordered under existing state law. (See In re Marriage of Fithian (1974) 10 Cal.3d 592, 604, cert. den., 419 U.S. 825.) That decree was never directly attacked and became

[2] (Pub.L. No. 97-252, § 1001 et seq., 96 Stat. 730, 10 U.S.C.A. § 1408.]

final and binding upon the parties.

Husband's attempted reliance on McCarty v. McCarty, supra, 453 U.S. 210, is misplaced. As recently restated in In re Marriage of Thomas (1984) 156 Cal.App.3d 631, 636-368, the holding in McCarty does not apply retroactively to judgments which were final before McCarty was decided. (Accord In re Marriage of Sheldon (1981) 124 Cal.App.3d 371, app. dism., 456 U.S. 941; In re Marriage of Fellers (1981) 125 Cal.App.3d 254; In re Marriage of Parks (1982) 138 Cal.App.3d 346.)

Thus, the final 1978 judgment awarding wife a community share of husband's military retirement benefits was valid and binding and not subject to husband's collateral or subsequent attack. (In re Marriage of Thomas, supra, 156 Cal.App.3d at p. 638.)

In view of our determination, we need not discuss husband's related contention as to the constitutionality of the FSPA, enacted in part to abrogate application of the McCarty decision. (See In re Marriage of Buikema (1983) 139 Cal.App.3d 689, 691.) We direct attention to recent decisions of this court and others upholding the FSPA and its retroactive application. (In re Marriage of Fairfull (1984) 161 Cal.App.3d 532, 535; In re Marriage of Lockstrom (1983) 148 Cal.App.3d 675; see also, In re Marriage of Sarles (1983) 143 Cal.App.3d 24; In re Marriage of Buikema, supra, 139 Cal.App.3d 689.)

Husband's waiver argument is based on wife's asserted failure to protest earlier and her oral agreement to accept less money. Wife denied the existence of such an agreement both in her supporting declaration and in her testimony. The

argument is rejected.

By its award of the arrearages, the trial court implicitly found no waiver, and "'" . . . [w]hen the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify. So far as it has passed on the weight of evidence or the credibility of witnesses, its implied findings are conclusive . . . ."'" (Graham v. Graham (1959) 174 Cal.App.2d 678, 682, quoting from Griffith Co. v. San Diego Col. for Women (1955) 45 Cal.2d 501, 507-508.)

We conclude that the evidence presented by wife adequately supports the trial court's implied finding that she neither waiver nor relinquished her right to her full proportionate share of husband's military retirement benefits.

Judgment affirmed.

Racanelli, P. J.

We concur:

Elkington, Jr.

Newsom, J.

APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102

July 31, 1985

I have this day filed Order

REVIEW DENIED

In re: No. A021180 JOAN E. FERN

vs.

ALBERT JOHN FERN, JR.,

Respectfully,

Clerk

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-297

ALBERT JOHN FERN, JR.,

Applicant,

v.

JOAN E. FERN

ORDER EXTENDING TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 28, 1985.

/s/ William H. Rehnquist
Associate Justice of the
Supreme Court of the
United States

Dated this 21st
day of October, 1985.

APPENDIX D

§ 3929. Computation of retired pay: law applicable

A member of the Army retired under this chapter is entitled to retired pay computed under chapter 371 of this title. Aug. 10, 1956, c. 1041, 70A Stat. 230.

§ 688 Retired members

(a) Under regulations prescribed by the Secretary of Defense, a retired member of the Regular Army, Regular Navy, Regular AirForce, or Regular MarineCorps, a member of the Retired Reserve who has completed at least 20 years of active service, or a member of theFleet Reserve or Fleet Marine Corps Reserve may be ordered to active duty by the Secretary of the military department concerned at any time. The Secretary concerned may, to the extent consistent with other provisions of law, assign a member ordered to active duty under this section to such duties as the Secretary considers necessary in the interests of national defense.

§ 802. Art. 2. Persons subject to this chapter

(4) Retired members of a regular component of the armed forces who are entitled to pay.

Constitution: AMENDMENT V--CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS, JUST COMPENSATION FOR PROPERTY

No person shall . . . be deprived of life, liberty, or property, without due

process of law; nor shall private property be taken for public use without just compensation.

§ 2101(c). Supreme Court; time for appeal or certiorari; docketing; stay

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

§ 1257(3). State courts; appeal; certiorari

By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

§ 1408. Payment of retired or retainer pay in compliance with court orders

(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a

member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate an payment under this section.

(d)((2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years of service creditable in determining the member's eligibility for retired or retaimer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

§ 1442a. Members of armed forces sued or prosecuted

A civil or criminal prosecution of a State of the United States against a member of the armed forces of the United States on account of an act done under color of his office or status, or in respect to which he claims any right, title, or authority under a law of the

United States respecting the armed forces thereof, or under the law of war, may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States for the district where it is pending in the manner prescribed by law, and it shall thereupon be entered on the docket of the district court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine the cause.

§ 1441. Actions removable generally

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. (As amended Oct. 21, 1976, Pub.L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, Pub.L. 96-486, § 2(a), 94 Stat. 2369.)

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions

where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between --

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

§ 3911. Twenty years or more: regular or reserve commissioned officers

The Secretary of the Army may, upon the officer's request, retire a regular or reserve commissioned officer of the Army who has at least 20 years of service computed under section 3926 of this title, at least 10 years of which have been active service as a commissioned officer. Aug. 10, 1956, c. 1041, 70A Stat. 224.

§ 5100. Mutual obligations

Husband and wife contract toward each other obligations of mutual respect, fidelity, and support. (Added by Stats.1969, c. 1608, p. 3337, § 8, operative Jan. 1, 1970.)

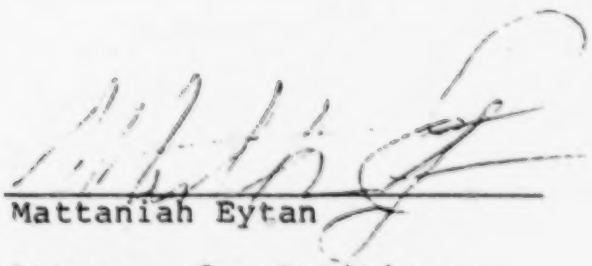
CERTIFICATE OF SERVICE

I, MATTANIAH EYTAN, one of the attorneys for petitioner Albert John Fern, Jr., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of November, 1985, I served copies of the foregoing Petition for Writ of Certiorari on the several parties thereto, as follows:

1. On John O. Marsh, Secretary of the Army, by depositing a copy of the document in a United States mailbox, with first class postage prepaid, addressed to William T. McGivern, Jr., Esq., Chief Assistant to the United States Attorney, 450 Golden Gate Avenue, 16th Floor, San Francisco, California 94102 and by depositing a copy of the Petition in a United States mailbox, with first class postage prepaid, addressed to Solicitor General, Department of Justice,

Washington, D.C. 20530.

2. On Joan Fern, by depositing a copy of the Petition in a United States mailbox, with first class postage prepaid, addressed to her counsel of record, Katherine E. Stoner, Esq., Stoner & Welsh, P.O. Box 128, Pacific Grove, California 93950.



Mattaniah Eytan

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